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IN THE

Supreme Court of the United States

GARY SHERWOOD SMALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

READING THE STATUTE AS A WHOLE RATHER THAN ONE TERM IN ISOLATION, "CONVICTED IN ANY COURT OF A CRIME" PUNISHABLE BY OVER ONE YEAR IN PRISON REFERS TO A FEDERAL OR STATE COURT 1

A. "Any Court" Refers to a Court in the United States 1

B. Congress' Purpose is Met by Applying the Law as Written, Not by Enlarging its Scope 6

C. The Structure and Context of the Gun Control Act Confirm that "Any Court" Means Federal and State Courts 7

D. The Exclusion of Federal and State Business Crimes, State Misdemeanors, and Restorations of Civil Rights Clarifies that Foreign Convictions Are Not Included 10

E. The Legislative History Precludes Application of Foreign Convictions 13

F. Congress Did Not Intend that Firearm Ownership Be Denied to American Citizens Based on Foreign Convictions, Which Do Not Meet American Standards of Justice 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES **Page**

Beecham v. United States, 511 U.S. 368 (1994) 13

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 5

Chicago v. Morales, 527 U.S. 41 (1999) 20

Colautti v. Franklin, 439 U.S. 379 (1979) 20

Crandon v. United States, 494 U.S. 152 (1990) 5

Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983) 4, 5

Evans v. U.S. Parole Comn, 78 F.3d 262 (7th Cir. 1996) . 5

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 1

Huddleston v. United States, 415 U.S. 814 (1974) 6, 7

Lewis v. United States, 445 U.S. 55 (1980) 2, 18

McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) 6

NRA v. Brady, 914 F.2d 475 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991) 6, 15

Nixon v. Missouri Municipal League, 124 S. Ct. 1555 (2004) 1

Rex v. Manley, 1 K.B. 529 (1933) 17

Sabetti v. Dipaolo, 16 F.3d 16 (1st Cir. 1994) 19

Scarborough v. United States, 431 U.S. 563 (1977) 6

Taylor v. United States, 495 U.S. 575 (1990) 4

United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985) 17

United States v. Bass, 404 U.S. 336 (1971) 7, 13, 20

United States v. Capps, 77 F.3d 350 (10th Cir. 1996) ... 20

United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990) .. 13

United States v. Concha, 233 F.3d 1249 (10th Cir. 2000) 11

United States v. Kole, 164 F.3d 164 (3d Cir. 1998), *cert. denied*, 526 U.S. 1079 (1999) 8-9

United States v. Gayle, 342 F.3d 89 (2nd Cir. 2003) .. 5, 14

United States v. Gonzales, 520 U.S. 1 (1997) 1

United States v. Oman, 91 F.3d 1320 (9th Cir. 1996) ... 13

United States v. R.L.C., 503 U.S. 291 (1992) 19

United States v. Ryan, 284 U.S. 167 (1931) 16

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 18

CONSTITUTION

U.S. Const., Amendment II 16, 17

U.S. Const., Amendment IV 17

U.S. Const., Amendment V 16, 17

STATUTES

8 U.S.C. § 1101(a)(26) 7

8 U.S.C. § 1101(a)(43) 18

8 U.S.C. § 1182(a)(2) 12

8 U.S.C. § 1182(a)(2)(A)(i)(II) 12

15 U.S.C. § 8 10

18 U.S.C. § 175b(a) 9

18 U.S.C. § 175b(d)(2)(B) 9

18 U.S.C. § 175b(d)(2)(H) 3

18 U.S.C. § 841(l) 9

18 U.S.C. § 842(i)(1) 9

18 U.S.C. § 921(a)(20) ..... *passim*

18 U.S.C. § 921(a)(20)(A) 10

18 U.S.C. § 921(a)(20)(B) 10, 11

18 U.S.C. § 921(a)(33)(A) 3, 12

18 U.S.C. § 922 15

18 U.S.C. § 922(g) 3, 8

18 U.S.C. § 922(g)(1) ..... *passim*

18 U.S.C. § 922(g)(5) 7, 12

18 U.S.C. § 922(g)(5)(A) 12

18 U.S.C. § 922(g)(6) 2

18 U.S.C. § 922(g)(8) 12

18 U.S.C. § 922(g)(9) 3, 12, 13

18 U.S.C. § 924(e) 4

18 U.S.C. § 924(e)(1) 3, 4, 9

18 U.S.C. § 924(e)(2)(A) 3, 9

18 U.S.C. § 924(e)(2)(B) 4

18 U.S.C. § 925A 16

18 U.S.C. § 930(e) 9

18 U.S.C. § 930(g)(3) 9

18 U.S.C. App. § 1201 ..... 8, 15

18 U.S.C. App. § 1202 ..... 4, 8, 15

18 U.S.C. App. § 1202(a) 4, 6, 14, 15

18 U.S.C. App. § 1202(a)(1) 2, 18

18 U.S.C. App. § 1202(c)(9) 4

18 U.S.C. App. § 1203 15

21 U.S.C. § 802 12

21 U.S.C. § 960(a) 9

21 U.S.C. § 960(b)(1) 9

The Brady Handgun Violence Prevention Act,
P.L. 103-159, 107 Stat. 1536 (1993) 15

Consolidated Appropriations Resolution,
P.L. 108-7, 117 Stat. 11 (2003) 4

Firearm Owners' Protection Act, P.L. 99-308,
100 Stat. 449 (1986) 4, 15, 17

Gun Control Act, P.L. 90-681, 82 Stat. 1213, 1214
(1968) 14

LEGISLATIVE MATERIAL

Cong. Rec. 6, 8, 16

Gun Control Act of 1968, Conference Report,
Report 1956, House Committee on the Judiciary,
90th Cong., 2d Sess. (1968) 14, 15

Senate Report 98-583, 98th Cong., 2d Sess. (1984) . 5, 8, 15

S. Rep. No. 1501, 90th Cong, 2d Sess. (1968) 7, 14

OTHER AUTHORITIES

The Gulag Archipelago (1974) 17

Hardy, David T., "The Firearms Owners' Protection Act:
A Historical and Legal Perspective," *Cumb. L. Rev.* 585

(1986/1987) 2

Nuremberg Trial Proceedings 16

*Restatement (Third) of Foreign Relations Law
of the United States* (1987) 19

Scholl, Inge, *The White Rose* (1983) 17

Washington Post, July 21, 2004 18

ARGUMENT

READING THE STATUTE AS A WHOLE RATHER THAN ONE TERM IN ISOLATION, "CONVICTED IN ANY COURT OF A CRIME" PUNISHABLE BY OVER ONE YEAR IN PRISON REFERS TO A FEDERAL OR STATE COURT

A. "Any Court" Refers to a Court in the United States

1. This case involves what it means to be "convicted in *any court* of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). '[A]ny' can and does mean different things depending upon the setting." *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555, 1561 (2004). The question is "how Congress could have envisioned" a provision "actually working" if applied expansively, and avoiding "strange and indeterminate results."[1] *Id.*

It is not disputed that "the word 'any' has an expansive meaning," *United States v. Gonzales*, 520 U.S. 1, 5 (1997); US Br. 10. The question here, however, is whether "court," read in context, means Federal and State courts. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), notes:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in

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[1] It is suggested that *Nixon* was decided wholly on federalism grounds. US Br. 11 n.4. However, *Nixon* rejected a broad reading of "any entity" due to the "futility and uncertainty" of that reading, finding the federalism concern to be "a complementary principle." 124 S. Ct. at 1566.

> isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if possible, all parts into an harmonious whole . . . ." (Citations omitted).

Ignoring context, the United States argues that § 922(g)(1) "'could not be more plain,' . . . in its intent to cover convicted felons broadly without geographic limitation." Br. 11, quoting *Lewis v. United States*, 445 U.S. 55, 65 (1980). This is the first of several instances in which *Lewis* is cited for such sweeping statements. Yet *Lewis* construed 18 U.S.C. App. § 1202(a)(1), which applied to a person who "has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony." Arguing that § 922(g)(1) applies to all "felons" begs the question of who Congress considered to be "felons."

The United States pushes the envelope by asserting that "any court" includes "military courts." Br. 12. That would include military courts in Saddam Hussein's Iraq and today's Sudan. The stretch is needless, for § 922(g)(6) prohibits firearm receipt by a person "who has been discharged from the Armed Forces under dishonorable conditions."[2] This is another instance in which Congress limited the scope of the prohibition to action by American institutions – in this case, "the Armed

[2] "Congress intended the dishonorable discharge, and not conviction of an offense punishable by more than a year's imprisonment, to be the litmus test of arms ownership following a court-martial." David T. Hardy, "The Firearms Owners' Protection Act: A Historical and Legal Perspective," 17 *Cumb. L. Rev.* 585, 642-43 n.315 (1986/1987).

Forces" mean the U.S. Armed Forces, not the Armed Forces of, say, Belgium or Cuba.[3]

2. The United States argues that the phrase "any court" contrasts with other provisions which explicitly refer to Federal or State convictions. Br. 12. Yet § 921(a)(20) itself does this by excluding "any Federal or State offenses pertaining to antitrust violations," "any State offense" (but not any Federal offense) which is a misdemeanor punishable by two years or less, and civil rights restorations which have meaning only in the context of State and Federal law.

Section 922(g)(9) refers to being "convicted in *any court* of a misdemeanor crime of domestic violence," but that does not mean any court in the world, as it means a conviction which is "a misdemeanor under Federal or State law." § 921(a)(33)(A). Congress may have thought the reference to Federal or State law to be necessary in light of decisions construing § 922(g)(1) to include foreign convictions.

18 U.S.C. § 924(e)(1) imposes enhanced penalties on a person who "violates section 922(g) of this title and has three previous convictions by *any court* referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both . . . ." The referenced "convictions by *any court*" are limited to two categories of crimes that are defined as violations of Federal or State law only.

First, "serious drug offense" is defined as specified drug offenses under the U.S. Code or "an offense under State law" involving drugs with certain criteria. § 924(e)(2)(A). Foreign

[3] Surely the United States would not suggest otherwise, despite language in a separate law restricting receipt of a biological agent by one who "has been discharged from the *Armed Services of the United States* under dishonorable conditions." 18 U.S.C. § 175b(d)(2)(H).

convictions are thereby excluded.

Second, "violent felony" is defined as a crime punishable by over one year's imprisonment which involves physical force against a person, burglary, or other specified offenses. § 924(e)(2)(B). This Court has interpreted these crimes to mean Federal or State offenses in *Taylor v. United States*, 495 U.S. 575, 579 (1990).

The predecessor of § 924(e) was the 1984 version of § 1202(a), which defined burglary as unlawful entry of a building "with intent to engage in conduct constituting a *Federal or State offense*." § 1202(c)(9) (emphasis added), in *Taylor*, 495 U.S. at 581. "In 1986, § 1202 was recodified as 18 U.S.C. § 924(e) by the Firearms Owners' Protection Act ["FOPA"], Pub. L. 99-308, § 104, 100 Stat. 458." 495 U.S. at 582.

Since the definition of "burglary" was later deleted, *Taylor* decided: "We believe that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. This Court did not suggest that a foreign conviction would apply or that the criminal codes of foreign countries would be applicable.

Congress knows how to refer to foreign jurisdictions in firearms statutes when it wishes to do so. It has prohibited use of funds under the Freedom of Information Act "with respect to records . . . provided by Federal, state, local or foreign law enforcement agencies in connection with arson or explosives incidents or the tracing of a firearm . . . ." Division J., Title 6, § 644, of Consolidated Appropriations Resolution, P.L. 108-7, 117 Stat. 11 (2003). No comparable language appears here.

3. The United States asserts, "This Court has long recognized that Congress, in Section 922(g), 'was reaching far and was doing so intentionally.'" Br. 13, quoting *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 116 (1983). Yet

Dickerson only stated that both felons and indicted persons were prohibited from receipt of firearms. *Id.* FOPA overruled *Dickerson*'s holding that State law did not govern whether a person was convicted.[4]

4. The United States seeks deference to agency opinion, noting ATF's 1987 regulation including a foreign offense as a disabling conviction. Br. 14. Yet "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring).[5] *United States v. Gayle*, 342 F.3d 89, 93 n.4 (2nd Cir. 2003), noted:

> [B]oth parties agreed that ATF's interpretation of a criminal statute is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), even if the statute were ambiguous. Moreover, ATF made clear in its explanation that its inclusion of foreign convictions was based solely on the fact that courts have so construed the statute.

The National Instant Criminal Background Check System ("NICS") accesses other record systems which include some foreign criminal history records. US Br. 15. However, the Brady Act, which established NICS, addresses Federal and State records exclusively, mentioning nothing about foreign

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[4] Senate Report 98-583, 98th Cong., 2d Sess., 7 & n.16 (1984) (noting that FOPA "would leave such a determination to the states and would render the *Dickerson* decision inapposite").

[5] "[J]udges do not defer to the Attorney General's interpretation of Title 18." *Evans v. U.S. Parole Com'n*, 78 F.3d 262, 265 (7th Cir. 1996).

records. *See* Pet. Br. 41-44.

B. Congress' Purpose is Met by Applying the Law as Written, Not by Enlarging its Scope

Congress' purpose in § 922(g)(1) is revealed by the specific classes of persons included and excluded by § 921(a)(20). That purpose is not found by conceiving of other "potentially dangerous persons." *See* US Br. 15. "The policy arguments forwarded by the Secretary [ATF] with respect to enforcement 'should be directed to the Congress rather than to [the courts].'" *NRA v. Brady*, 914 F.2d 475, 485 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), quoting *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 22 (1963).

The United States suggests that explanations of § 1202(a) imply that foreign convictions are included. Br. 16, quoting *Scarborough v. United States*, 431 U.S. 563, 573 (1977) ("noting congressional purpose to keep firearms away from those 'whose prior behaviors have established their violent tendencies'"). That quotation was from Senator Long, sponsor of Title VII, and similar statements by others also concerned Title VII – which encompassed, as provided by § 1202(a), only Federal and State convictions.[6] None of them implied that the law would include foreign convictions.

The United States attributes to *Huddleston v. United States*, 415 U.S. 814, 824 (1974), agreement that foreign

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[6] 114 Cong. Rec. 14,773-14,774 (1968) (Sen. Long remarks introducing Title VII); *id.* at 16,298 (Rep. Pollock) (remark about "criminals" directed to Title VII). Sen. Tydings referred to "a local ordinance" prohibiting firearm receipt by a person with "a criminal record." *Id.* at 13,220.

convictions were included. Br. 17. *Huddleston* stated:

> The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S Rep No. 1501, 90th Cong, 2d Sess, 22 (1968).

415 U.S. at 824. This is the same Senate Report No. 1501 with the words: "The term 'felony' means, in the case of a Federal law, an offense punishable by imprisonment for a term exceeding one year, and, in the case of a State law, an offense determined by the laws of the State to be a felony." *Id.* at 56.

The United States (Br. 17) quotes *United States v. Bass*, 404 U.S. 336, 345 (1971), about "especially risky people," but *Bass* concerned § 1202(a), under which such risky people were persons with Federal or State convictions.

C. The Structure and Context of the Gun Control Act Confirm that "Any Court" Means Federal and State Courts

1. Potentially-dangerous foreigners are the subject of § 922(g)(5), US Br. 18, which prohibits firearm receipt by any person:

> who, being an alien –
>
> (A) is illegally or unlawfully in the United States; or
>
> (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)) . . .

The ban on firearm receipt by illegal aliens is how Congress sought to punish foreign criminals who come to the United States and acquire firearms. Title VII declared Congress' intent to disarm "felons" and "aliens who are illegally in the country," § 1201, and made firearm receipt unlawful by persons convicted of Federal or State felonies and by illegal aliens. § 1202. FOPA consolidated all prohibited persons into § 922(g), including, inter alia, "convicted felons" and "illegal aliens." Senate Report 98-583, *supra*, at 12.

Congress prohibited firearm receipt by illegal aliens in order to address what the United States characterizes as "the dangers posed by individuals coming into the United States from abroad and purchasing firearms."[7] Br. 19. While this broad net would not include the handful of American citizens who are convicted of crimes in foreign countries, Congress is not required to solve every problem, and countervailing reasons existed not to criminalize firearm receipt by American citizens convicted in foreign countries.

The United States notes "the dangers posed by individuals who engage in gun trafficking across national boundaries," Br. 19-20, but that subject is irrelevant to whether "convicted in any court" includes only Federal and State convictions. A law interpreted as punishing international drug trafficking has no pertinence here. US Br. 19, citing *United States v. Kole*, 164 F.3d 164, 175 (3d Cir. 1998), *cert. denied*,

[7] The same objective is served by the prohibition on firearm receipt by foreigners here on non-immigrant visas, which was enacted in 1998 and which has liberal exemptions. *See* 18 U.S.C. § 922(y); 144 Cong. Rec. S8639 ff. (1998) (remarks of Sen. Durbin).

526 U.S. 1079 (1999).[8] Exemplifying the Gun Control Act's focus on Federal and State convictions, enhanced penalties under § 924(e) for drug offenses are imposed only on a person convicted under Federal or State law. § 924(e)(2)(A).

2. The United States points to other portions of the U.S. Code which allegedly use the phrase "convicted in any court" to include foreign convictions, but cites no cases so holding. Br. 20-21. 18 U.S.C. § 175b(a) prohibits receipt of a biological agent or toxin by a person who "has been convicted in any court of a crime" punishable by more than one year. § 175b(d)(2)(B). No cases have construed this provision, which includes no comparable references to Federal and State law as set forth in § 921(a)(20).

18 U.S.C. § 842(i)(1) prohibits receipt in commerce of an explosive by a person who "has been convicted in any court of a crime" punishable by more than one year. Excluded from that term are "Federal or State offenses pertaining to antitrust violations" and "any State offense classified by the laws of the State as a misdemeanor" and punishable by two years or less. § 841(l). No reported cases on foreign convictions exist.

The United States cites to a provision "within the gun control law itself," Br. 21 n.12, noting that 18 U.S.C. § 930(g)(3) explicitly refers to "any court of the United States." But that is in the context of a prohibition on possession of a firearm "in a Federal court facility." § 930(e). Without the

[8] 21 U.S.C. § 960(a) punishes drug offenses specified in the U.S. Code, and § 960(b)(1) imposes an enhanced sentence on one who "commits such a violation after a prior conviction for a felony drug offense." *Kole* held that such "prior conviction" included a Philippine conviction based on sufficient due process. However, § 960(b)(1) includes no comparable references to Federal and State law as does § 921(a)(20).

reference to "any court of the United States," the provision might be construed to apply to State courts. But even if it referred only to "any court," no one would interpret that to include foreign courts.[9]

D. The Exclusion of Federal and State Business Crimes, State Misdemeanors, and Restorations of Civil Rights Clarifies that Foreign Convictions Are Not Included

The United States makes the counter-intuitive argument that the references in § 921(a)(20) to Federal and State crimes means that foreign convictions are included. Br. 22. To the contrary, these references are incompatible with recognition of foreign convictions.

First, it is suggested that if "any court" only means Federal and State courts, no reason exists to refer to "any *Federal or State* offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices . . . ." § 921(a)(20)(A). Yet that language clarifies that both Federal and State offenses are included, and not, for instance, just Federal offenses.

That is made clear by the succeeding reference to "any *State offense* classified by the *laws of the State* as a misdemeanor and punishable by a term of imprisonment of two years or less." § 921(a)(20)(B). That precludes exempting from the prohibition any *Federal offense* classified by the *laws*

[9] 15 U.S.C. § 8 prohibits trusts in restraint of trade and, "on conviction thereof in any court of the United States," punishes the violator. Had that been worded "in any court," it still would have meant only a court of the United States, for only there would one be tried for a federal offense.

of the United States as a misdemeanor and punishable by imprisonment for two years or less. This undercuts the suggestion that if "any court" only means Federal and State courts, "there would have been no need to include the modifier 'State' for the misdemeanor offenses" in this provision. US Br. 22.

Second, the United States speculates that Congress was "quite familiar" with and thus exempted the specified Federal and State business crimes, but intended to include comparable foreign business crimes as disabling, because it did not know whether "analogous conduct in foreign jurisdictions would lead to felony convictions in the first place." Br. 23. That makes no sense, for if the person had no felony conviction, the issue would not even arise. It is further suggested that Congress did not know whether an exemption for foreign business crimes would apply only to "non-dangerous individuals." Br. 23-24. Yet it is unclear why a foreign antitrust violator would be any more dangerous than an American one. *See United States v. Concha*, 233 F.3d 1249, 1254 (10th Cir. 2000) (noting "the anomalous situation that fewer domestic crimes would be covered than would be foreign crimes").

Third, it is true that statutes may not be disregarded just because they may entail peculiar results. US Br. 24-25. But when the text is not clear, irrational results should be avoided. The text does not clearly include foreign convictions, and it is unclear why Congress would exempt Federal and State antitrust violators but include foreign ones, or would exempt certain American State misdemeants but not Canadian ones.[10]

[10] By contrast, § 921(a)(20)(B) clearly does not exempt Federal misdemeants of the same type, and Congress need not specify any basis for this difference.

The United States worries that persons convicted of murder and terrorism abroad may come to the United States and obtain firearms. Br. 26. Congress addressed that problem by prohibiting firearm receipt to any alien who "is illegally or unlawfully in the United States." § 922(g)(5)(A). Aliens convicted of serious crimes and terrorists cannot lawfully enter the United States,[11] and if they slip past our borders, they are illegal aliens subject to § 922(g)(5). While that does not include U.S. citizens convicted by a foreign court, such instances are rare, and Congress is not required to address every conceivable problem.

The United States cannot reconcile § 922(g)(9)'s reference to one "convicted *in any court* of a misdemeanor crime of domestic violence," with § 921(33)(A)'s definition of the crime as "a misdemeanor under Federal or State law," precluding foreign law. It asserts that Small's reading "would leave the phrase 'Federal or State law' no work to do," Br. 27, but Congress may well have used that language to preclude any overexpansion of the crime to include foreign convictions, as had taken place with the provision at issue here.[12] No reason

[11] Aliens convicted of specified crimes, involved in terrorism, and similar classes are ineligible for admission to the United States. 8 U.S.C. § 1182(a)(2). Interestingly, such crimes include "a violation of . . . any law or regulation of a State, the United States, *or a foreign country* relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." § 1182(a)(2)(A)(i)(II).

[12] It is claimed that under Small's approach, "a person convicted of violating a restraining order by telephoning his estranged wife is barred for life from possessing firearms," but that person could commit a murder abroad and then buy a gun here. Br. 27. No such law exists. Section 922(g)(8) bars firearm receipt to one "who *is* subject" to certain restraining orders, but that expires with the expiration of the restraining order.

has been suggested why "any court" would mean anything different in § 922(g)(1) and (9).

The government is silent on the last two sentences of § 921(a)(20). First, "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." That was a FOPA amendment mandating that State law controlled in lieu of a Federal standard. *Beecham v. United States*, 511 U.S. 368, 373 (1994). As it stands, federal courts in any given State must decide questions of the laws of any of the fifty States.[13] But Congress did not intend for U.S. courts to determine the law of foreign nations, states, and localities.

Secondly, the government ignores the person who "has had civil rights restored" and the other exclusions in the last sentence of § 921(a)(20). These exclusions only make sense in the context of restoration of rights under the laws of the States and of the United States. Restoration of the rights to vote, to run for office, and to serve on a jury typically restore the right to possess a firearm. *E.g.*, *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990). Under the government's reading, Federal courts would have to decide whether civil rights are restored under the laws of any country and political subdivision in the world. Congress intended no such result.

E. The Legislative History Precludes Application of Foreign Convictions

1. Congress has a long tradition of prohibiting firearm

[13] *E.g.*, *United States v. Oman*, 91 F.3d 1320, 1322 (9th Cir. 1996) (Arizona district court must decide whether civil rights restored under Massachusetts law).

receipt based on felony conviction in Federal and State courts. US Br. 29. But it is inaccurate to assert that Congress "deleted *those* limitations" through amendments to "enlarge[] the group of people coming within the Act." US Br. 29, quoting *Bass*, 404 U.S. at 343 n.10. *Bass* involved § 1202(a), which recognized only Federal and State convictions.

The United States argues that Congress did not find references to Federal and State courts unnecessary, for it used them in the exclusion of antitrust crimes and in the definition of misdemeanor crime of domestic violence. Br. 30. Yet existing references to the Federal and State courts clarify the law and do not imply that foreign courts are included.

2. Senate Report No. 1501, at 56, proposed that "felony" in the Gun Control Act be defined solely in terms of Federal and State law. The Conference Report adopted the House language instead, but did not suggest any substantive difference. Gun Control Act of 1968, Conference Report, Report 1956, House Committee on the Judiciary, 90th Cong., 2d Sess., 28-29 (1968). *See United States v. Gayle*, 342 F.3d 89, 94-95 (2nd Cir. 2003).

The United States argues that "Those reports *postdate* by three and four months respectively Congress's enactment of the 'any court' language in Section 922(e) of the 1968 Omnibus Act." Br. 31. However, the Gun Control Act *superseded* Title IV of the Omnibus Act, which included that provision. § 102, P.L. 90-681, 82 Stat. 1213, 1214 (1968).

While the Senate language was not enacted, it expressed the understanding of Congress. The *only* substantive difference resolved in favor of the House version was that "the crime referred to in the House bill is one punishable by imprisonment for more than 1 year and the crime referred to in the Senate amendment is a crime of violence punishable as a felony."

Report 1956 at 28-29. Note the common use of the term "the crime," without any implication that the Senate bill was seen as having, in the United States' words, "restricted the courts that could enter triggering felonies." Br. 32.

3. FOPA "repeals Title VI of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. app. 1201-1203). These provisions are merged into similar provisions in 18 U.S.C. 922 . . . ." Senate Report 98-583, *supra*, at 30. Section 1202(a)'s reference to conviction by Federal or State courts appeared more concisely in FOPA as "convicted by any court."

The United States objects that Senate Report 98-583 concerned an "unenacted bill," S. 914, rather than S. 49, which was enacted as FOPA. Br. 32 n.22. However, the version of § 921(a)(20) in S. 914 was exactly as passed in FOPA.[14] Moreover, the Report's discussion of the revisions presuppose conviction by a Federal or State court, and no other. *Compare* Pet. Br. 37-39 *with* US Br. 33.

The Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536 (1993), set up background checks for Federal and State convictions, and is silent on foreign convictions. *See* Pet. Br. 41-44. That records of some foreign convictions might be accessed by the system, US Br. 34, misses the point that Congress passed no such provision in the Act.

The Brady Act established procedures to correct erroneous Federal and State records which result in denial of a

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[14] Senate Report 98-583 at 42; P.L. 99-308, 100 Stat. 449, 450 (1986). "S. Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub. L. No. 99-308." *NRA v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

firearm. § 103(g); 18 U.S.C. § 925A. This was intended to protect the rights to keep arms and to due process.[15]

The United States attributes to Congress an intent to recognize foreign convictions which, if erroneous, cannot be corrected. Br. 34-35 n.24. An American citizen can thereby be denied receipt of a firearm based on erroneous information and has no remedy. Given its concern with Second and Fifth Amendment rights, Congress intended not to recognize foreign convictions.

F. Congress Did Not Intend that Firearm Ownership Be Denied to American Citizens Based on Foreign Convictions, Which Do Not Meet American Standards of Justice

Interpreting the law to apply to convictions by any court in the world would lead to absurd results. "A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." *United States v. Ryan*, 284 U.S. 167, 175 (1931). The world is awash with dictatorships, and even our Allies have inquisitional legal systems which fail to meet American standards of justice.

The leading sponsor of the Gun Control Act was Senator Thomas J. Dodd. *See* 113 Cong. Rec. 3255 (1967)

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[15] Rep. Hoekstra wished to "guarantee the second amendment rights of citizens by requiring law enforcement officials to provide written documentation for any denials that might be rendered." 139 Cong. Rec. H9111 (1993). Rep. Brooks noted that "as this bill is written, a person can be denied the right to make a lawful handgun purchase – without any cause, and without any explanation. What could be more fundamental to due process than to require the Government to tell you why you cannot exercise a right that is being exercised by others every day?" *Id.* at H9122.

(introduction of S. 1, Amend. 90). Having been a prosecutor at the Nuremberg war crimes trials, Dodd would not have been one to recognize foreign convictions. He prosecuted Nazis for having prosecuted Jehovah's Witnesses in the courts and sent them to concentration camps. *Nuremberg Trial Proceedings*, vol. 3, at 497.[16]

FOPA was signed by President Ronald Reagan, who praised Aleksandr Solzhenitsyn for exposing Soviet totalitarianism – including its judicial system – in *The Gulag Archipelago* (1974). Since Solzhenitsyn had been convicted of anti-Soviet crimes and sentenced to eight years, would it have been a felony for him to receive a firearm after he moved to the United States? Is that what Congress intended under FOPA, with its findings in favor of "the rights of the citizens" under the Second, Fourth, and Fifth Amendments? § 1(b), 100 Stat. 449.

"In contrast to what is permitted under other legal systems, the Constitution of the United States mandates that, before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is held accountable be prohibited with sufficient specificity to forewarn of the proscription of said conduct." *United States v. Anzalone*, 766 F.2d 676, 678 (1st Cir. 1985). Soviet law recognized "crimes by analogy" for "any socially dangerous act" not directly defined by law. *Id.* n.1. Even in England, "all such acts or attempts as tend to the prejudice of the community, are indictable." *Rex v. Manley*, 1 K.B. 529, 534 (1933).

Nor should one forget the American women "accused

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[16] Germans were convicted of "vulgarly defam[ing] the Führer" and listening to foreign radio broadcasts. Inge Scholl, *The White Rose* 120 (1983).

by the Taliban of preaching Christianity," a serious offense.[17] Or Iran's crackdown on women who flout the Islamic dress code during the hot summer,[18] or the history professor convicted of "insulting Islamic sacred beliefs."[19]

1. The United States argues that foreign convictions count, in that a potentially unconstitutional State conviction did not void the prohibition of former §1202(a)(1). Br. 36, citing *Lewis*, 445 U.S. at 60-67; *id.* at 58 n.4. Disregarding the logical leap, *Lewis* involved convictions by the States, which operate under American criminal justice procedures.

2. Foreign convictions may be recognized for extradition purposes. US Br. 38-39. That is irrelevant here.

Foreign convictions are considered in the U.S. immigration laws. US Br. 41, citing 8 U.S.C. 1101(a)(43). But that applies only to aliens, not to U.S. citizens. Bill of Rights guarantees apply to members of our national community, not to aliens in foreign lands. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

Foreign convictions are not included in computing criminal history under the Sentencing Guidelines. Guidelines § 4A1.2(h); US Br. 42-43. However, the following may be considered for an upward departure:

> (A) Prior sentences(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses). . . .
>
> (E) Prior similar adult criminal conduct not resulting in a criminal conviction.

Id., § 4A1.3(a)(2). Thus, foreign convictions are treated no better than bad conduct with no conviction.

3. The United States argues that, *if* the fairness of a foreign conviction is considered, it should "require nothing more than the most fundamental rudiments of fair process." Br. 45. This rejects what appears superficially to be a more searching probe approved by the court below based on the *Restatement (Third) of Foreign Relations Law of the United States* § 482 cmt. b (1987), cited in App. 5-7a.

The approach of the court below leaves the public without knowledge of the law. If "the court must satisfy itself that the foreign conviction comports with our notions of fundamental fairness," App. 4a, one would not have that information until the court so decides. With a State or Federal conviction, no such vagueness exists – a person is on notice that receipt of a firearm is unlawful.

Reliance on the *Restatement* only compounds the vagueness here. *Sabetti v. Dipaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (opinion by Breyer, C.J.) explains:

> "It is not enough" . . . for the true meaning of the statute "to be apparent elsewhere," in extra-textual materials . . . . The idea is that ordinary individuals trying to conform their conduct to law should be able to do so by reading the *face* of a statute – not by having to appeal to outside legal materials. (Citation omitted.)[20]

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[17] AP release, Nov. 15, 2001, http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2001/11/15/international2356EST0968.DTL.

[18] http://news.bbc.co.uk/2/hi/middle_east/3827101.stm.

[19] *Washington Post*, July 21, 2004, A14.

[20] If the necessary fiction that one is presumed to know the law from the statutes "descends to needless farce when the public is charged even with knowledge of Committee Reports," *United States v. R.L.C.*, 503 U.S. 291, 30 (1992) (Scalia, J., concurring), it is worse when the public is charged with knowledge of esoteric items like the *Restatement*.

4. The rule of lenity must be applied to avoid vagueness. *Cf.* US Br. 46. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 56 (1999). Both concerns exist here.

Whether one has been convicted of a disabling crime "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held," and involves such questions as whether one "has had civil rights restored." § 921(a)(20). If applied to foreign law, this does not provide due notice to ordinary people of what is prohibited. It need not be proven that the defendant knew that he was a felon, *United States v. Capps*, 77 F.3d 350, 353 (10th Cir. 1996), yet "the absence of a scienter requirement" may render a statute "a trap for those who act in good faith." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Given that the police and courts must decide questions of foreign law – not just the laws of Arizona or Maine, but those of Sudan and the Ukraine – arbitrary and discriminatory enforcement will be encouraged.

The above vagueness evaporates by applying the rule of lenity, in which "doubts are resolved in favor of the defendant." *Bass*, 404 U.S. at 347-48. The terms "convicted in any court" mean convicted by a Federal or State court.

CONCLUSION

This Court should reverse the judgment of the court of appeals and vacate the conviction.